

Before the  
Federal Communications Commission  
Washington, DC 20554

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In the Matter of )

1998 Biennial Regulatory Review -- )  
Streamlining of Radio Technical Rules in )  
Parts 73 and 74 of the Commission's Rules )

MM Docket No. 98-93

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

### COMMENTS

Big River Broadcasting Corp. ("Big River"), licensee of WSBM, WQLT(FM) and WXFL(FM), Florence, Alabama, hereby submits comments in support of the proposal set forth in the *Notice of Proposed Rule Making and Order*, FCC 98-117 (Released June 15, 1998) ("NPRM") "to allow the filing of contingent minor change FM construction applications . . . on the same date." *NPRM* at 8, ¶¶ 13-15. In support of this proposed amendment to the rules, Big River shows as follows:

1. The *NPRM* states that such contingent minor change applications "would be processed and if grantable, granted simultaneously." Construction permits "would be conditioned as necessary to allow an orderly implementation of non-interfering service." However, if any one application in the group of contingent minor change applications could not be granted, then the Commission proposes "to dismiss all applications filed as an interrelated group." *Id.* at ¶ 13.

2. The *NPRM* proposes to permit the filing of contingent one-step upgrade and downgrade applications and tentatively concluded that "in these circumstances the preclusion of competing allotment and minor change proposals is consistent with the

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public interest.” *Id.* at ¶ 14. Finally, the Commission tentatively concluded that it should limit contingent applications to “four related, simultaneously filed applications,” although it raised the question whether “a different policy should apply where some or all proposals involve stations under common ownership.” *Id.* at ¶ 15.

3. Big River has recent and significant experience with the application of the Commission’s contingent application rule – Section 73.3517 – which provides that “contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing.” Big River has pending before the Commission an application for review of an action by the Mass Media Bureau (“Bureau”) dismissing two one-step upgrade applications as “contingent”.<sup>1</sup> One problem with this rule has been the absence of any definition of the term “contingent”. However, as Big River’s own experience has shown, the present application of the rule does not always serves the public interest. For that reason, Big River strongly supports the proposed amendment to the rules, with a four to six application limit, common ownership notwithstanding. Adoption of this amendment will permit the reinstatement, processing and grant of the dismissed applications.

### **Background**

4. Big River will highlight the factual background of the case pending before the full Commission, because this particular background demonstrates the need for the proposed amendment.

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<sup>1</sup> Because that is a restricted proceeding, Big River is serving the adverse party and Bureau counsel with copies of these Comments.

Big River and H-M-S Broadcasting Co. (“H-M-S”) simultaneously tendered, on March 22, 1996, an integrally-related package of three one-step applications:

- a) Big River tendered a one-step application for a construction permit for minor modification of WXFL to change from Channel 241A to Channel 241C2, at a new transmitter site (File No. BPH-960322IF);
- b) H-M-S tendered a one-step application for a construction permit for minor modification of WDXE-FM, Lawrenceburg, TN to upgrade from Channel 240A to Channel 294A <sup>2</sup> and to increase power at its licensed transmitter site and antenna height (File No. BPH-960322IB).
- c) Big River tendered a one-step application for a construction permit for minor modification of WQLT to reduce power (at the licensed transmitter site and antenna height) and to downgrade the channel from Channel 297C to Channel 297C-1 status (File No. BPH-960322ID); and

Before filing these applications, Big River and H-M-S had researched FCC rules and procedures and discussed the matter with the Bureau staff. The Bureau staff advised that the applications would not violate Section 73.3517 of the Rules and Regulations and that Big River and H-M-S did not have to request a waiver of the contingent application rule. <sup>3</sup>

On June 14, 1996, the Bureau granted the WQLT one-step downgrade application. The Bureau advised Big River that once it filed an FCC Form 302-FM application for license to cover the WQLT construction permit, then the Bureau would grant simultaneously the WQLT license application, the WDXE-FM application for CP, and the WXFL application for CP. <sup>4</sup>

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<sup>2</sup> The adjacent IF channel change, from Channel 240A to Channel 294A, permits WDXE-FM to increase power from 3 kW to 6 kW and to achieve maximum Class A facilities, which it cannot do on Channel 240A.

<sup>3</sup> Big River and H-M-S had first considered filing a petition for rulemaking. However, the Allocations Branch advised against that procedure since each of the changes could be accomplished under “one-step” application procedures. It indicated that a petition for rulemaking might be returned as unacceptable because of the availability of the one-step application procedures.

<sup>4</sup> Sequentially, the downgrade of WQLT(FM) to Channel 297C1 permits WDXE-FM to upgrade to Channel 294A, which in turn permits WXFL(FM) to upgrade to Channel 241C2. The applications proposed and required no other changes to the Table of FM Allotments or in the facilities of any other FM broadcast stations.

Accordingly, Big River immediately reduced WQLT's power, consistent with the terms of the construction permit and the Bureau's written instructions. Big River tendered, on June 17, 1996, an application for license (File No. BLH-960617KA).

Thereafter, on June 26, 1996, D. Mitchell Self Broadcasting, Inc. ("Self"), then licensee of WSHK-FM, Russellville, AL, and of WLAY-AM-FM, Muscle Shoals, AL – all three of which stations are direct market competitors to Big River – informally objected to the WDXE-FM and WXFL applications as "contingent". Furthermore, on June 26, 1996, Self also tendered a "Petition for Rulemaking" proposing the allotment of Channel 294A at Pulaski, Tennessee. Self's Pulaski proposal was short-spaced to the earlier-filed WDXE-FM application. In addition, Self's proposal was short-spaced to the licensed Class C facilities of WQLT and presumed the downgrade of WQLT to Class C1 status, even though the Commission had not granted WQLT's application for license BLH-960617KA. The Allocations Branch has not yet dismissed the Pulaski petition, notwithstanding its defects.

On November 26, 1996, the Bureau dismissed the WDXE-FM and WXFL applications as "contingent".

On December 4, 1996, Big River withdrew the application for license for WQLT, and returned to a Class C power level, because the Bureau indicated that it would not let the license application remain in pending status while Big River and H-M-S pursued efforts to reinstate the WXFL and WDXE-FM applications. On December 12, 1996, the Bureau dismissed the application for license for WQLT. However, Big River still holds the construction permit BPH-960322ID for modification of the WQLT facilities to permit reinstatement of the WXFL and WDXE-FM applications.

On December 17, 1996, Big River and H-M-S petitioned for reconsideration of the dismissal of the WXFL and WDXE-FM applications. As part of the Petition for Reconsideration, Big River and H-M-S requested (and demonstrated good cause for) a waiver of §73.3517 of the Rules and Regulations concerning contingent applications. Self opposed the petition.

On May 28, 1997, Big River and H-M-S tendered a "Petition for Rulemaking" (RM-0150) to amend the Table of FM Allotments and to modify the licenses (a) for WXFL to specify operation on Channel 241C2 and Killen, AL as the community of license (in lieu of Channel 241A at Florence, AL), (b) for WQLT to specify operation on Channel 297C1 (in lieu of Channel 297C) at Florence, AL, and (c) for WDXE-FM to specify operation on Channel 294A (in lieu of Channel 240A) at Lawrenceburg,

TN. The Allocations Branch has not yet released a Notice of Proposed Rule Making.

On June 27, 1997, the Bureau denied the December 17, 1996, "Petition for Reconsideration"

On July 25, 1997, Big River and H-M-S applied for Commission review.

5. Big River does not herein seek to reargue its Application for Review or discuss why the Commission should grant a waiver of the contingent application rule as the Commission has previously indicated it "would be favorably disposed" to do. *Thunderbolt Broadcasting Company*, 13 FCC Rcd 6959, 6963 (1998). Instead, Big River simply wants to point out that the proposed amendment makes sense and serves the public interest.

6. The Florence, AL/Lawrenceburg, TN situation describes a very unusual situation involving three one-step applications – if Big River downgrades one of its stations, it can upgrade another of its stations, provided H-M-S's adjacent channel station upgrades to an IF channel. Big River has no reason to downgrade (and cannot be compelled to) WQLT to a lower class channel (and lose full Class C protection) if it cannot be protected from competing proposals and concurrently obtain the upgrade of WXFL.

7. So long as WQLT remains a full Class C station, no *bona fide* competing allotment and minor change proposals can be filed. Self merely proposed allotment of Channel 294A at Pulaski, Tennessee, as part of its litigation strategy to block the upgrade of WXFL. However, Self's Pulaski proposal is not a *bona fide* proposal, because it is short-spaced to the licensed Class C facilities of WQLT. The only way the Commission could ever allot Channel 294A at Pulaski, Tennessee, is if Big River accepted a unilateral downgrade of WQLT(FM) from Class C to Class C-1 facilities, without the companion

upgrade of WXFL(FM) from Class A to Class C-2 facilities. Big River simply will not allow that to happen.

8. If Big River cannot be protected from competing proposals, then WQLT(FM) will remain a full Class C station, WXFL(FM) will remain a Class A station, and WDXE-FM will remain a 3 kW Class A station operating with less than maximum Class A facilities. Strict enforcement of the contingent application rule, as the Bureau has done, means that more than 193,000 persons in underserved areas of Alabama and Tennessee will not receive improved service.

9. The Florence/Lawrenceburg situation involves three simple one-step applications, each of which is readily grantable, provided the applications are granted simultaneously or in the correct sequence. They were tendered as an integrally related package, on the same day, pursuant to agreement between Big River and H-M-S. The applications cross-referenced one another. Most importantly, no competing allotment or application proposals were precluded by the package of applications, because of the fundamental fact that if the applications were not granted as a package, then WQLT(FM) would remain a full Class C station.<sup>5</sup>

10. Big River submits that amendment of the contingent application rule as proposed serves the public interest. However, any such amendment must preclude consideration of subsequently-filed counter-proposals, conflicting proposals, or any other proposal that assumes an unwanted change to the FM Table of Allotments, such as the

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<sup>5</sup> In fact, grant of the package of three applications will create new allotment opportunities after the three modifications have been given effect.

unilateral downgrade of WQLT(FM). The proposed amendment to the contingent application rule is a logical progression of the “one-step” application rules and procedures already adopted by the Commission, which preclude consideration of conflicting proposals. *Amendment of the Commission’s Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4738-39 (1993); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *pet. for recon. granted in part*, 8 FCC Rcd 4743, 4745 (1993). The same public interest analysis that supported the adoption of those rules also supports the adoption of the proposed amendment to the contingent application rule, because the amendment will speed the implementation of service modifications, eliminate redundant processing, provide certainty to applicants who will not be exposed to conflicting proposals, encourage licensees to seek to improve service to the public by removing risks, and generally provide certainty and protection from exposure to conflicting proposals and objections, not all of which are *bona fide*.

WHEREFORE, Big River supports the proposed amendment to Section 73.3517 of the Rules, as proposed in the *NPRM*.

Respectfully Submitted,

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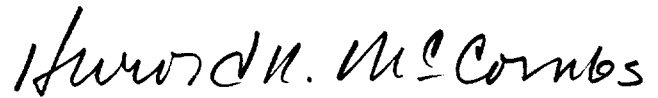


## CERTIFICATE OF SERVICE

I, Harold K. McCombs, Jr., do hereby certify that I have caused to be served by mail, First Class postage prepaid, or by hand, this 20th day of October, 1998, copies of the foregoing "Comments", on the following persons:

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